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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>REGINALD BUTLER,<br><br>Defendant and Appellant. | D050580<br><br><br><br>(Super. Ct. No. SCD202014) |

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

Reginald Butler appeals a judgment entered following his guilty plea to one count of possession of cocaine base, a controlled substance (Health & Saf. Code, § 11350, subd. (a)). On appeal, he contends: (1) he was denied his statutory right to have the same judge hear his second motion to suppress evidence under Penal Code[1] section 1538.5; (2) the doctrine of collateral estoppel barred the trial court from admitting evidence

1 All further statutory references are to the Penal Code unless otherwise specified.

suppressed in response to his first motion to suppress; and (3) he was denied his constitutional right to due process of law.

## FACTUAL AND PROCEDURAL BACKGROUND

On August 12, 2006, San Diego Police Officer Maria Delgadillo saw Butler walking along Island Avenue. She recognized Butler because she had arrested him about one and one-half years before. Believing Butler was on parole, Delgadillo asked him whether he was still on parole. Butler replied, "Yes." When she asked him whether he had anything on him, he replied, "No." She handcuffed Butler and conducted a parole search, finding 0.27 grams of rock cocaine in his shirt pocket.

Apparently about August 16, a complaint was filed (in San Diego County Superior Court Case No. SCD200827) charging Butler with one count of possession of cocaine base (Health & Saf. Code, § 11350, subd. (a)).[2] The complaint also alleged he had six prior prison commitments (§§ 667.5, 668) and one prior "strike" conviction (§§ 667, subds. (b)-(i), 1170.12, 668). At his August 29 preliminary hearing, he was bound over on the charge and allegations and the complaint was deemed the information. On September 14, Butler filed a section 1538.5 motion to suppress the evidence seized during the parole search. On October 5, following a hearing, the trial court granted Butler's motion to suppress. On October 18, pursuant to the prosecution's motion, the case was dismissed. The prosecution stated that it would refile the charges.

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[2] Although the record on appeal does not contain a copy of the complaint, both parties represent this fact in their briefs. Accordingly, we presume the complaint was filed as represented.

On October 18, the prosecution filed a new complaint against Butler (in San Diego County Superior Court Case No. SCD202014) with the same charge and allegations as contained in the first complaint. At his December 14 preliminary hearing, he was bound over on the charge and allegations and the complaint was deemed the information. On January 2, 2007, Butler filed a motion to collaterally estop the prosecution from relitigating the trial court's order granting his motion to suppress in Case No. SCD200827. The prosecution opposed the motion, arguing section 1538.5, subdivision (j), expressly provides that on dismissal and refiling of a case, a prior ruling on a motion to suppress is not binding. On January 24, the trial court deferred Butler's collateral estoppel motion until trial.

On February 5 the case was assigned for trial. Butler filed a section 1538.5 motion to suppress the evidence seized during the parole search. Before jury selection, the trial court heard and denied Butler's collateral estoppel motion. The court also denied Butler's motion to suppress as untimely filed. Butler then entered into a plea agreement with the prosecution, pleading guilty to the possession charge and admitting the prior strike conviction allegation. As part of that plea agreement, Butler expressly waived his right to appeal the denial of his section 1538.5 motion. The trial court struck the prison prior conviction allegations and sentenced Butler to 32 months in prison.

Butler timely filed a notice of appeal and a request for issuance of a certificate of probable cause for appeal. The trial court granted his request and issued a certificate of probable cause.

## DISCUSSION

### I

### *Denial of Section 1538.5, Subdivision (p), Right to Same Judge*

Butler contends the trial court prejudicially erred by denying his section 1538.5, subdivision (p), right to have his second motion to suppress heard by the same judge who granted his first motion to suppress.

#### A

At the October 5, 2006, hearing on Butler's first motion to suppress (in Case No. SCD200827), San Diego County Superior Court Judge Howard H. Shore granted the section 1538.5 motion to suppress evidence. At the beginning of the hearing on February 5, 2007 (in Case No. SCD202014), Butler requested that his "motion . . . be heard in front of Judge Shore as [he] was the judge in the previous matter [who] granted the [section] 1538.5 [motion] before the case was dismissed and refiled." San Diego County Superior Court Judge Melinda J. Lasater denied his request. The court then heard and denied Butler's collateral estoppel motion. The court also denied Butler's motion to suppress as untimely filed.

#### B

Section 1538.5 provides that a defendant may move to suppress evidence obtained as a result of an unreasonable search or seizure:

> "(a)(1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: [¶] (A) The search or seizure without a warrant was unreasonable. [¶] . . . [¶]

> "(j) . . . If the case has been dismissed pursuant to Section 1385 either on the court's own motion or the motion of the people after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). . . . [¶] . . . [¶]
>
> "(p) If a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing as otherwise provided by subdivision (j), unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing. *Relitigation of the motion shall be heard by the same judge who granted the motion at the first hearing if the judge is available*." (Italics added.)

Section 1538.5, subdivision (j)'s provision "for the nonbinding effect, after dismissal and refiling, of a prior superior court ruling [on a motion to suppress] was added [in] 1993 . . . in response to *Schlick v. Superior Court* (1992) 4 Cal.4th 310 . . . ." (*People v. Gallegos* (1997) 54 Cal.App.4th 252, 259.) Furthermore, "[i]n response to legislative concerns that this ability [to dismiss, refile, and relitigate] would lead to forum shopping, the Legislature included the last sentence of section 1538.5, subdivision (p) which, we conclude, means that the second suppression motion is required to be heard by the judge who heard the first suppression motion, if the judge is available to hear the motion." (*Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 879.) *Soil* further concluded that section 1538.5, subdivision (p)'s language "must be construed as applying to all relitigations, not just to suppression motions which have been heard two times." (*Id*. at p. 880.)

C

We assume arguendo, in the circumstances of this case, section 1538.5, subdivision (p), required the same judge (i.e., Judge Shore) who decided Butler's first motion to suppress hear his second motion to suppress, and therefore the trial court erred by denying Butler's request for a hearing and decision by the same judge. Nevertheless, we conclude that, as the People assert, pursuant to Butler's plea agreement, he *waived* his right to appeal the trial court's error in denying his request to have the same judge hear and decide his second motion to suppress. After Butler's second motion to suppress was denied, Butler entered into a plea agreement, pleading guilty to the possession charge and admitting his prior strike conviction. As part of that plea agreement, Butler expressly waived his right to appeal the denial of his section 1538.5 motion. His plea agreement stated: "8. **(Appeal Rights)** I give up my right to appeal the following: 1) denial of my [section] 1538.5 motion . . . ." Butler initialed adjacent to that statement and signed his name at the end of the plea agreement. His defense counsel also signed a statement confirming that he had "personally read and explained" to Butler the "entire contents of this plea form" and "the consequences of this plea . . . ." At the February 5, 2007, hearing, the trial court asked Butler if he understood the rights he waived pursuant to the plea agreement: "[B]ecause of the motions I just [ruled on], do you understand that if you plead guilty you're giving up your right to appeal the issues relating to your [section] 1538.5 motion?" Butler replied, "No." The court then explained:

> "It says here that you're giving up your . . . rights to appeal the following: The denial of your [section] 1538.5 motion and issues related to strike priors and any sentence stipulated hereon. [¶] So as I

> understand it, you're giving up your right to appeal the issues that I've just decided."

Butler's counsel then interjected: "Your Honor, is it -- it would be my understanding that the collateral estoppel motion could still be subject to appeal." The court stated:

> "I think this needs to be aired out. If that's what the People intended, that's fine with me. If it's not what the People intended, then we need to know that now. Because . . . I did deny your [section] 1538.5 motion in there."

The prosecutor then agreed with Butler's position that he waived the right to appeal the denial of his section 1538.5 motion, but preserved his right to appeal the trial court's denial of his collateral estoppel motion. The court found Butler made a knowing, intelligent, and voluntary waiver of his constitutional rights, and he understood the nature of the charges and the consequences of his plea. The court then accepted Butler's plea and sentenced him in accordance with the plea agreement.

Based on Butler's plea agreement and the discussion at the hearing regarding his waiver of his right to appeal, we conclude he waived his right to appeal the denial of his second section 1538.5 motion to suppress evidence. (Cf. *People v. Kelley* (1994) 22 Cal.App.4th 533, 534-537.) Furthermore, pursuant to that general waiver, Butler also implicitly waived his right to appeal the trial court's denial of his request to have the same judge (i.e., Judge Shore) who decided his first motion to suppress also hear and decide his second motion to suppress. The trial court's denial of that request was preliminary to and thus part of its denial of his second section 1538.5 motion. Accordingly, Butler cannot challenge on appeal the trial court's denial of his request to have the same judge who decided his first motion to suppress also hear and decide his second motion to suppress.

In any event, even were Butler able to challenge that ruling, he has made no attempt to show that the purported error was prejudicial. In his opening and reply briefs, he merely argues in conclusory terms that the error was prejudicial. Based on the record in this case, we presume the same judge who heard Butler's first motion to suppress would have denied his second motion to suppress as untimely filed on the first day of trial. Therefore, we conclude Butler has not shown it is reasonably probable he would have obtained a more favorable result had the trial court granted his request to have the same judge who decided his first motion to suppress also hear and decide his second motion to suppress. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)[3]

II

*Collateral Estoppel*

Butler contends the doctrine of collateral estoppel barred the trial court from admitting evidence suppressed pursuant to the trial court's order granting his first motion to suppress. He argues the constitutional prohibition against double jeopardy requires collateral estoppel to be applied to bar the admission of evidence suppressed pursuant to the court's order granting his first section 1538.5 motion.

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3 To the extent Butler contends the trial court erred by denying his request to have the same judge who decided his first motion to suppress also hear and decide his collateral estoppel motion, he does not show that error was prejudicial. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) Based on our discussion below, the doctrine of collateral estoppel did not apply to bar the prosecution from dismissing the first case, refiling the case, and then relitigating the motion to suppress.

A

"In general, collateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding. [Citations.] 'Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' [Citation.]" (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 848-849.) "The party asserting collateral estoppel bears the burden of establishing these requirements." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) "In criminal cases, the doctrine of collateral estoppel is derived from the double jeopardy clause in the Fifth Amendment." (*In re Cruz* (2003) 104 Cal.App.4th 1339, 1344.)

"Even assuming all the threshold requirements are satisfied, however, our analysis is not at an end. We have repeatedly looked to the public policies underlying the doctrine before concluding that collateral estoppel should be applied in a particular setting. [Citation.] As the United States Supreme Court has stated, 'the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a nineteenth century pleading book, but with realism and rationality.' [Citations.] Accordingly, the public policies underlying collateral estoppel--preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants

from harassment by vexatious litigation--strongly influence whether its application in a particular circumstance would be fair to the parties and constitutes sound judicial policy. [Citation.]" (*People v. Lucido*, *supra*, 51 Cal.3d at pp. 342-343, fn. omitted.) "It must be remembered that '[c]ollateral estoppel is an equitable concept based on fundamental principles of fairness.' [Citation.]" (*White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763.)

On appeal, most courts apply a de novo, or independent, standard of review in determining whether the trial court properly applied, or refused to apply, the doctrine of collateral estoppel. (*Roos v. Red* (2005) 130 Cal.App.4th 870, 878.) Where "the facts determining whether the trial court properly applied [or refused to apply] collateral estoppel are uncontested, . . . application of the doctrine is a question of law to which we apply an independent standard of review." (*Ibid*., fn. omitted.)

B

The parties agree the only threshold requirement for application of collateral estoppel in issue in this case is the requirement that the decision in the former proceeding be final and on the merits. Butler asserts, and the People disagree, that the trial court's order granting his section 1538.5 motion to suppress in the first case (i.e., Case No. SCD200827, subsequently dismissed by the People) was "final" for purposes of collateral estoppel and therefore precluded the trial court from denying his collateral estoppel motion in the second case (i.e., Case No. SCD202014).

However, finality for purposes of the doctrine of collateral estoppel in criminal cases generally does not occur until jeopardy has attached for purposes of the

constitutional prohibition against double jeopardy. (*People v. Gallegos, supra,* 54 Cal.App.4th at p. 267; *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1556.) Although "[c]ollateral estoppel applies in criminal proceedings independent of double jeopardy principles" (*id.* at p. 1555), in determining finality of a prior decision "collateral estoppel effect is ordinarily accorded only to determinations reached in proceedings in which jeopardy attached. [Citations.]" (*Id.* at p. 1556.) In particular, *Meredith* stated: "[A] pretrial suppression ruling is not ordinarily considered 'final' so as to preclude relitigation in another proceeding. [Citation.] Relitigation of suppression issues is not precluded where charges have been refiled following the grant of a motion to dismiss under . . . section 1538.5 . . . ." (*Id.* at p. 1556.) Jeopardy generally "attaches when a jury is empaneled and sworn, or, in a bench trial, when the [trial court] begins to receive evidence." (*U.S. v. Martin Linen Supply Co.* (1977) 430 U.S. 564, 569.) Accordingly, "[j]eopardy does not attach when felony charges are dismissed prior to trial . . . ." (*Gallegos*, at p. 267.) Because in this case the prosecution dismissed the first case after the trial court granted Butler's section 1538.5 motion to suppress but *before* a jury was empaneled and sworn (or the court received evidence) at trial, jeopardy did not attach and therefore the court's order granting the first motion to suppress was not final within the meaning of the doctrine of collateral estoppel.[4] Accordingly, the trial court correctly denied Butler's collateral estoppel motion in the second case.

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4 To the extent *Gallegos* and *Meredith* relied on our opinion in *People v. Methey* (1991) 227 Cal.App.3d 349 (disapproved on another ground in *Schlick v. Superior Court, supra,* 4 Cal.4th at p. 315) in concluding a trial court's order granting a motion to

The prosecution's act of dismissing the first case did not make the trial court's order granting the motion to suppress final within the meaning of the doctrine of collateral estoppel. Dismissal by the prosecution did not constitute a *judicial* act resulting in the end of that case. (Cf. *People v. Scott* (2000) 85 Cal.App.4th 905, 919 ["for . . . collateral estoppel to apply there must be a *final* judgment or determination of an issue; that is, a judgment or determination that is final in the sense that no further judicial act remains to be done to end the litigation."].) Because the prosecution, not the trial court, ended the first case, the court's pretrial order granting Butler's motion to suppress is not final for purposes of the doctrine of collateral estoppel.

Furthermore, we are not persuaded by Butler's apparent argument that the policy reasons underlying the doctrine of collateral estoppel require its application in the circumstances of this case. He argues application of collateral estoppel in this case would prevent harassment that would otherwise result from allowing the prosecution to relitigate the motion to suppress. However, by enactment of section 1538.5, subdivision (j), the Legislature made a policy determination to allow the prosecution to do what it did in this case. We conclude the prosecution's dismissal of the case after the trial court granted the first motion to suppress, refiling of the case, and relitigation of the motion to suppress does not constitute undue harassment of Butler that would support or require

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suppress is not final for purposes of collateral estoppel until jeopardy attaches, we agree with those cases that the California Supreme Court in *Schlick* did not criticize our conclusion in *Methey* that collateral estoppel did not apply to preclude relitigation of a motion to suppress pursuant to section 1538.5, subdivision (j), after dismissal by the prosecution of the first case. (*People v. Gallegos*, *supra*, 54 Cal.App.4th at p. 267; *People v. Meredith*, *supra*, 11 Cal.App.4th at p. 1556.)

application of collateral estoppel in this case. (*People v. Gallegos, supra*, 54 Cal.App.4th at p. 267; *People v. Methey*, *supra*, 227 Cal.App.3d at p. 358; *People v. Lucido*, *supra*, 51 Cal.3d at pp. 342-343.)

III

*Due Process of Law*

Butler contends he was denied his constitutional right to due process of law when the trial court allowed the prosecution to relitigate the motion to suppress pursuant to section 1538.5, subdivision (j). Although Butler concedes *Gallegos* rejected due process challenges to section 1538.5, subdivision (j), he argues it is both inapposite and poorly reasoned and therefore its conclusion should not apply to this case.

After a lengthy (i.e., nine-page) discussion of the appellant's facial and "as applied" due process challenges to section 1538.5, subdivision (j), *Gallegos* concluded:

> "We find that no constitutional right has been violated. Appellant was not restricted in what witnesses could be called or what evidence could be presented at the second hearing. Appellant could rely upon his earlier points and authorities, or was free to file supplemental points and authorities. Appellant's motion was heard by the same judge who granted his earlier motion, as required by section 1538.5, subdivision (p). The same would be true as to defendants in general. Appellant received a full and complete hearing on his motion to suppress, which is all that due process requires." (*People v. Gallegos*, *supra*, 54 Cal.App.4th at pp. 267-268.)

We find the reasoning in *Gallegos* to be both detailed and persuasive and therefore apply its conclusion to the circumstances of this case.

Although Butler argues that, unlike the appellant in *Gallegos*, he did not receive a hearing on his second motion to suppress, the absence of a hearing was of his own

making. The trial court properly denied Butler's second motion to suppress without an evidentiary hearing because it was untimely filed on the first day of trial. Therefore, he cannot complain he did not receive a hearing on that motion. Butler also argues *Gallegos* is inapposite because in that case the same judge heard the second motion to suppress. As discussed above, the trial court rejected Butler's request to have the same judge hear his collateral estoppel motion. To the extent the court's ruling also applied to Butler's untimely second motion to suppress, Butler does not show that motion would have been granted had the same judge heard it. On the contrary, we presume the same judge likewise would have denied the second motion to suppress as untimely filed.

Furthermore, as discussed above, in Butler's plea agreement he expressly waived his right to appeal the denial of his motion to suppress, which included his right to have the same judge hear his second motion to suppress. Therefore, he cannot now raise that purported error on appeal. Finally, although he apparently complains his collateral estoppel motion was not heard until the day of trial, he does not show that constituted error or that such deferral of the hearing denied him due process of law. Accordingly, Butler has not persuaded us *Gallegos* is either poorly reasoned or inapposite. As in *Gallegos*, Butler was not denied an *opportunity* to be heard and present evidence on either his collateral estoppel motion or his second motion to suppress. To the extent Butler was prevented from presenting evidence on his second motion to suppress, he denied himself that opportunity to be heard and present evidence by untimely filing that motion. We conclude Butler was not denied his constitutional right to due process of law.

## DISPOSITION

The judgment is affirmed.

McDONALD, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.